UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

DEFENSE SUPPORT SERVICES LLC (DS2)[1]

Employer

and Case 4–RC–21166

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS DISTRICT LODGE 1, AFL-CIO[2]

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Defense Support Services LLC (DS2), is a company that helps to maintain weapon systems for the United States Department of Defense (DOD) at various locations throughout the world, including the Tobyhanna Army Depot (the Tobyhanna Depot) in Tobyhanna, Pennsylvania. The Petitioner, Machinists District Lodge 1, seeks to represent a unit of production and maintenance employees employed by the Employer at the Tobyhanna Depot. The Employer contends that an election in this unit should not be conducted because the petitioned-for employees all are temporary employees. In addition, the Employer contends that the petition must be dismissed because the petitioned-for employees are jointly employed by the Employer and the federal government and that these employers have not consented to an election in a multiemployer unit.

A Hearing Officer of the Board held a hearing, and the Employer filed a brief. I have considered the evidence and the arguments presented by the parties and have concluded that the employees sought by the petition are not temporary employees because their termination date is not certain. I have also concluded that the Employer's employees are not jointly employed by the federal government, and even if they were jointly employed, as the Petitioner seeks to bargain solely with the Employer, an election may be conducted in the petitioned-for unit. Accordingly, I have directed an election in this unit.

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[1] The Employer's name appears as amended at the hearing.

[2] The Petitioner's name appears as amended at the hearing.

In this Decision, I will first present the relevant legal standards for the issues in this case. Then I will set forth the facts. Finally, I will explain the reasoning that supports my conclusions.

I. RELEVANT LEGAL STANDARDS

Temporary Employees

Temporary employees are ineligible to vote, and their eligibility is determined based on their status as of the payroll eligibility date. *WDAF Fox 4,* 328 NLRB 3 (1999), enfd. 232 F.3d 943 (8th Cir. 2000). Temporary employees who are employed on the eligibility date, and whose tenure of employment remains uncertain, are eligible to vote. *Marian Medical Center*, 339 NLRB 127 (2003); *Ameritech Communications, Inc.*, 297 NLRB 654, 655-656 (1990). A finding of temporary employee status does not necessarily require that the employee's tenure is certain to expire on an exact calendar date; it is only necessary that the prospect of termination is sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired. *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1257 (2001); *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992). When termination dates are not immutable, and the employer considers the purported temporary employee for a permanent position, there is no "date certain" for termination. *WDAF Fox 4*, above. Employees originally hired as temporary employees who are retained beyond the original term of their employment, and subsequently employed for an indefinite period, are included in the unit. *MJM Studios of New York*, above; *Orchard Industries*, 118 NLRB 798, 799 (1957).

Joint Employer Status

Two otherwise separate employers are joint employers if they "share or codetermine those matters governing essential terms and conditions of employment" for a particular group of employees. *TLI, Inc.*, 271 NLRB 798 (1984); enfd. 772 F.2d 894 (3rd Cir. 1985); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). Sharing or codetermining essential terms and conditions of employment involves, "meaningfully affect[ing] matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *Riverdale Nursing Home, Inc.*, 317 NLRB 881, 882 (1995); *Southern California Gas Co.*, 302 NLRB 456, 461 (1991). The determination of whether two entities are joint employers "is essentially a factual issue." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

In *Oakwood Care Center*, 343 NLRB No. 76 (2004), the Board overruled its decision in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), and reaffirmed its earlier decisions in *Lee Hospital*, 300 NLRB 947 (1990) and *Greenhoot, Inc.*, 205 NLRB 250 (1973). Consistent with those cases, the Board held in *Oakwood* that employees of joint employers may not be included in a unit with employees solely employed by one of those employers, absent the consent of both employers.

II. FACTS

Background

At the Tobyhanna Depot, federal government employees rebuild and refurbish military equipment for redeployment in war zones. The volume of this work increased significantly several years ago, and in the fall of 2003, the DOD arranged with Lockheed Martin Logistics Management (Lockheed) to provide skilled employees to augment the federal work force at the Tobyhanna Depot. On August 16, 2004, Lockheed and Day & Zimmerman entered into a joint venture to create the Employer, and the Employer has continued to provide the services previously provided by Lockheed, pursuant to a "Delivery Order" which runs through September 30, 2006.

The Employer's employees at the Tobyhanna Depot include electricians, sheet metal mechanics, forklift drivers, painters, shipping clerks, warehouse specialists, and systems analysts, among other classifications. They work alongside the federal employees and perform the same types of work. The work is performed on three shifts.

The Employer's Employees' Anticipated Tenure of Employment

The work at the Tobyhanna Depot is part of a multi-billion dollar DOD program called "Reset." There is no date certain as to when this program will end and no discernible end in sight, as the program stems from the increased demand for weaponry necessitated by the war in Iraq and the global war on terror. The Employer's recent Program Manager at the Tobyhanna Depot, Mark Wood,[3] testified that the Employer has not been given a specific date when its services will no longer be needed. He stated that consideration is being given to moving the work to Germany or other locations closer to the war zone.

Unless the Delivery Order is renewed or extended, the Employer's employees will not continue to be employed at the Tobyhanna Depot after its expiration in September 30, 2006. The record does not contain evidence as to the likelihood of renewal of the Delivery Order, although the Employer suggested at the hearing that its work will not end until the Reset program terminates following the conclusion of the war in Iraq. The Delivery Order for the Employer to provide employees at the Tobyhanna Depot is part of a 10-year contract with the DOD for the Employer to provide services throughout the country. That contract expires in 2007.

When hiring employees for the Tobyhanna Depot, the Employer's practice is to inform them that they are "at-will" and that their employment is temporary in nature. The Employer's written offer of employment to employees, however, does not indicate that the job is temporary, but only that the employees are at-will.[4] On various occasions, Program Manager Wood met with groups of employees at the Tobyhanna Depot. When asked about job security, he emphasized that employees could be terminated at any time. There is no evidence that the

[3] Wood was promoted to a different position a few weeks before the hearing.

[4] In this connection, the offer letter states that the Employer may terminate the employee at any time with or without cause.

Employer's employees were ever told that their employment would end when the Delivery Order expires.

If a reduction in force is necessary at the Tobyhanna Depot, the Employer's employees, rather than the federal employees with whom they work, will be terminated. If an employee's job is eliminated, the Employer will try to employ him or her elsewhere, but there is no guarantee that the employee will not be discharged. When the need for employees increases, the Employer attempts to rehire the employees who were discharged before seeking other applicants.

In the fall of 2003, in both a Bulletin to employees and an article in the Tobyhanna Depot's newspaper, Depot Commander Col. Tracy Ellis outlined future plans. He stated that he envisioned a temporary workload surge and, in addition to hiring new government employees, he planned to hire contract employees on a temporary basis "to support the short-term FY 04 workload attributed to Operation Iraqi Freedom and the Global War on Terrorism." He further indicated that the Tobyhanna Depot would release these employees once their services were no longer required.

The number of employees employed by the Employer at the Tobyhanna Depot has since fluctuated considerably. The Employer began operations there in 2003 with nine employees. The employee complement expanded to a maximum of about 600 employees in February 2005, and the Employer now employs about 320 employees at the Tobyhanna Depot. About 170 of the Employer's former employees have been hired as permanent employees by the federal government. Others have been laid off; in 2005 there were three layoffs affecting over 100 employees.[5] At a recent meeting, however, the Employer informed employees that about 50 new employees will be hired within the next few weeks. About 40 to 50 percent of the Employer's employees have worked at the Tobyhanna Depot for more than a year, and a witness at the hearing has worked there for two years and eight months.

The Relationship between the Employer and the DOD

The Delivery Order states that the Employer will provide "labor services to support manufacturing and remanufacturing operations of electrical, electronic and mechanical systems and subsystems" for the Tobyhanna Depot. It also states that the Employer's employees "are employees of the contractor and under his administrative control," and that the Employer "is accountable to the government for the actions of [its] personnel."

In addition to the Delivery Order, a number of other documents explain the relationship between the Tobyhanna Depot's government employees and the Employer's employees. A Contract Directive issued by the federal government in October 2003, states among other things, that the Tobyhanna Depot does not have an employer-employee relationship with any of the employees of its contractors. It emphasizes this point as follows:

[5] The first layoff affected 77 employees, and the second layoff affected of 50 employees. The record does not indicate how many employees were laid off on the third occasion.

> An employer-employee relationship under a service contract occurs when contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific task or service, with the right to reject the finished product, task or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee. The key question always to keep in mind: *Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract.* We must always be able to answer with a resounding 'NO.' [Emphasis in original].

A document issued to the Tobyhanna Depot's federal employees entitled, "Information for Employees' Interaction with Contractors in the Workplace," indicates, among other things, that, "the normal employee-supervisor relationship does not exist" between government supervisors and contractor employees. The document specifically states that, "Although there may be Tobyhanna personnel and contractor workers working side by side, the Government supervisor does not supervise the contractor workers." The document also discourages government employees from inviting contractor employees to office social events and requires that they be careful when discussing information in front of contractor employees.

The Depot is staffed primarily by civilian DOD employees who are represented by a federal employees' union. There are also some military personnel at the Tobyhanna Depot, but they do not work on the shop floor. The Employer's employees work together with the federal employees, often performing the same tasks on the same equipment together. Depot management sets performance standards for their work. With the exception of a Program Manager and Deputy Manager, the Employer does not provide managers or supervisors at the site. The Employer designates some employees as team leaders.[6]

The Employer's employees' wages are set by a wage determination issued by the United States Department of Labor, pursuant to the Service Contract Act, and federal employees receive different wage rates than the Employer's employees. Employee pay stubs list the Employer exclusively.

The Employer determines its employees' holidays and work schedules, and handles its own hiring. The Employer also decides on employee requests for paid time off and Family Medical Leave Act (FMLA) absences. Employees contact representatives of the Employer if they need to be absent from work. The federal employees have alternative work schedules that do not always coincide with the Employer's employees' schedules.

Federal employees and the Employer's employees share the same facilities, including break areas and cafeterias. The Employer's employees wear yellow badges specifically

[6] The parties stipulated to the exclusion of the team leaders from the unit. The record does not indicate whether team leaders are supervisors.

identifying them as contractor employees, while federal employees wear blue badges. The Employer provides all tools and protective equipment for its employees and is required to train its employees and comply with all Depot rules and regulations.

Federal government managers make decisions concerning which work will be performed at which time, and the DOD provides all quality control services. A federal leadperson may directly inform an employee of the Employer what equipment to work on each day. Alternatively, a federal supervisor may tell one of the Employer's team leaders what work to do, and the team leader will transmit that instruction to the employee. The equipment worked on by the Employer's employees is federal government property.

If a federal supervisor perceives a performance problem with one of the Employer's employees, the supervisor can ask the Employer to investigate the problem, or can direct the employee's immediate removal from the work force. The extent of discipline, if any, is solely within the Employer's discretion, although DOD supervisors may make recommendations to the Employer as to how to deal with employee problems.

The Employer has a collective-bargaining agreement with another Machinists' local covering employees who work at Tyndall Air Force Base in Florida. That contract originated with Lockheed. Many of the Employer's employees at Tyndall work in classifications similar to the classifications of the Employer's employees at the Tobyhanna Depot. The Employer's employees at Tyndall do not work alongside federal employees, although they perform work that had previously been performed by federal employees.

III. ANALYSIS

Temporary Employees

Despite the Delivery Order's September 30, 2006 expiration date, the tenure of employment of the Employer's employees is uncertain. The Employer and its predecessor, Lockheed, have provided employees at the Tobyhanna Depot since 2003, pursuant to the "Reset" program, because of the war in Iraq and the global war on terror. There is no date certain as to when the Reset program will end, and the Employer has not been given a date when its services will no longer be required.

The Employer's employees were verbally informed that their employment was temporary, but they were not told that it would end when the Delivery Order expires or on any other date, and the written offer of employment sets no limit on their tenure. The Employer's employee complement has fluctuated considerably during the past three years, but many of the Employer's employees have worked at the Tobyhanna Depot for more than a year. Significantly, while more than 100 employees have been laid off in the last year, the Employer is currently hiring at least 50 employees. Thus, there is no indication that the Employer's work is nearing conclusion.

In summary, the record does not establish that the Employer's employees will be terminated on September 30 or at any other specific time. As the Employer's employees at the Tobyhanna Depot are employed for an unlimited duration, they are eligible voters. *MJM Studios of New York*, 336 NLRB 1255, 1257 (2001); *Ameritech Communications*, 297 NLRB 654 (1990).

Joint Employer

The Employer contends that the Board's decisions in *Greenhoot*, above, and *Lee Hospital*, above, should apply to preclude the processing of the petition. Specifically, the Employer asserts that the Employer's employees are jointly employed by the Employer and the DOD and that these employers have not consented to an election in the petitioned-for unit.

However, the *Greenhoot* and *Lee Hospital* decisions are inapplicable to the instant case. In this connection, the Petitioner does not seek a multiemployer unit, which would require the federal government's consent, but seeks solely to bargain with the Employer for a unit consisting exclusively of the Employer's employees. Therefore, it is immaterial whether the DOD jointly employs the Employer's employees.

To the extent that the Employer further contends that the Board does not have jurisdiction in this case because the Employer is a joint employer with a federal government department, this contention is also without merit. In *Management Training Corp*., 315 NLRB 1355, 1358 fn. 16, (1995), the Board indicated that it is irrelevant whether the private employer that is the subject of a petition is a joint employer with a related exempt entity. In emphasizing this point, the Board added that, "The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control." See also *Jacksonville Urban League, Inc*., 340 NLRB 1303, fn. 4 (2003). Thus, the Employer's connection to the federal government does not remove the Employer from the Board's jurisdiction.

Moreover, even if *Greenhoot* and *Lee Hospital* were applicable to this situation, the record shows that the DOD is not a joint employer of the Employer's employees. The Employer hires its employees by itself and retains the right to determine its employees' wages, pursuant to the Service Contract Act. The Employer also solely determines holidays, other paid time off, and FMLA leave for its employees. Although the federal government can ask that an employee of the Employer be investigated for performance problems or be immediately removed from the job, it is the Employer that ultimately determines whether they will be disciplined and at what level.

Additionally, although the federal government determines the work assignments of all employees, including the Employer's employees, the DOD has continually emphasized that it is not an employer of contractor employees that work at the Tobyhanna Depot. Thus, the Delivery Order directly states that the Employer's employees are employees "of the contractor," and the Contract Directive stresses that the government seeks to avoid exercising sufficient supervision and control over contractor employees to establish an employer-employee relationship. In these

circumstances, there is insufficient evidence that the DOD meaningfully affects the Employer's employees' essential terms and conditions of employment, and the federal government therefore is not a joint employer with the Employer. *The Bronx Health Plan,* 326 NLRB 810 (1998); enfd. 203 F.3rd 51 (D.C. Cir. 1999); *Teamsters Local 776 (Pennsy Supply),* 313 NLRB 1148, 1160-1164 (1994); *Osco Drug, Inc.*, 294 NLRB 779, 785-788 (1989).

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part-time production and maintenance employees employed by the Employer at the Tobyhanna Army Depot, located at 11 Hap Arnold Boulevard, Tobyhanna, Pennsylvania, **excluding** all other employees, office clerical employees, production control clerks, supply technicians, team leads, managers, guards and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by the **International Association of Machinists and Aerospace Workers, District Lodge 1, AFL-CIO.** The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven **(7)** days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the ***full*** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **June 27, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597–7658, or by e-mail to Region4@NLRB.gov.[7] Since the list will be made available to all parties

[7] See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board, or to a Region's electronic mailbox. OM 05-30 is available on the Agency's website at www.nlrb.gov.

to the election, please furnish a total of two **(2)** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three **(3)** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five **(5)** working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail, see http://gpea.NLRB.gov/. This request must be received by the Board in Washington by 5:00 p.m., EDT on **July 5, 2006.**

Signed: June 20, 2006

at Philadelphia, Pennsylvania

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four